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No. 98-24

In the Supreme Court of the United States

OCTOBER TERM, 1997

MITZI BAKER, PETITIONER

v.

WILLIAM J. HENDERSON,
POSTMASTER GENERAL OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record
FRANK W. HUNGER
Assistant Attorney General
MARLEIGH D. DOVER
MATTHEW M. COLLETTE
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

21pp

QUESTION PRESENTED

Whether the United States Postal Service is a "government agency" exempt from punitive damages under the Civil Rights Act of 1991, 42 U.S.C. 1981a(b)(1).

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v.

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POSTMASTER GENERAL OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A9) is reported at 114 F.3d 668. The order of the district court denying the motion to strike petitioner's claim for punitive damages (Pet. App. B1-B10) is reported at 922 F. Supp. 1296. The district court's order awarding compensatory and punitive damages to petitioner is reported at 922 F. Supp. 1300.

JURISDICTION

The judgment of the court of appeals was entered on June 12, 1997. The petition for a writ of certiorari was

[1] William J. Henderson is substituted for Marvin T. Runyon as respondent, pursuant to this Court's Rule 35.3.

filed on September 10, 1997.[2] The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Constitution vests Congress with the power to "establish Post Offices and post Roads." U.S. Const., Art. I, § 8. Pursuant to that power, Congress has provided for the federal government's operation of a national postal system since the late 1700s. In 1829, the Post Office became a Cabinet-level executive department. See *United States Postal Service* v. *Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 121-122 (1981).

In the Postal Reorganization Act of 1970 (PRA), Congress overhauled the postal system in order to improve its management and efficiency. The PRA transformed the Post Office Department into the United States Postal Service, "an independent establishment of the executive branch of the Government of the United States." 39 U.S.C. 201. In making that change, Congress sought to create a Postal Service that would be "freed from direct political pressures and endowed with the means of building a truly superior mail service." H.R. Rep. No. 1104, 91st Cong., 2d Sess. 1 (1970). The PRA was designed to "remov[e] the day-to-day management of the Postal Service from both presidential and congressional areas of concern while still leaving the Postal Service subject to broad policy guidance." *Id.* at 13.

The PRA provides that the Postal Service "shall be operated as a basic and fundamental service provided to the people by the Government of the United States, authorized by the Constitution, created by Act of

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[2] Because the petition was initially filed in the incorrect format, it was not placed on the Court's docket until June 30, 1998.

Congress, and supported by the people." 39 U.S.C. 101(a). The Postal Service has "as its basic function the obligation to provide postal services to bind the Nation together." *Ibid.* An eleven-member Board of Governors directs the Postal Service's operations. Nine Governors are appointed by the President, with the advice and consent of the Senate. The Governors then select a Postmaster General and Deputy Postmaster General, who occupy the remaining two seats on the Board. § 202; see *Silver* v. *United States Postal Service*, 951 F.2d 1033 (9th Cir. 1991). The Governors are "officer[s] of the Government of the United States." 39 U.S.C. 205(d). Postal employees generally are subject to the same codes of conduct, criminal prohibitions, and hiring preferences as other federal employees. §§ 410(b), 1005, 1006.

Congress empowered the Postal Service to adopt rules and regulations, which are published in the Code of Federal Regulations. 39 U.S.C. 401(2); 39 C.F.R. Pt. 3. The Postal Service is subject to the Federal Tort Claims Act and numerous other federal laws regulating the operations of federal agencies, such as the Freedom of Information Act, the Government in the Sunshine Act, the Privacy Act, and laws imposing hiring restrictions. 39 U.S.C. 409(c), 410(b). The Postal Service may exercise the power of eminent domain "in the name of the United States" and may negotiate and conclude international postal treaties and conventions with other nations. §§ 401(9), 407.

The Postal Service submits an annual budget to the Office of Management and Budget; that budget is then transmitted to Congress by the President along with his overall budget. 39 U.S.C. 2009. Funds of the Postal Service are deposited in the Postal Service Fund, which is part of the federal Treasury. § 2003. All revenues

received by the Postal Service are appropriated back to it. § 2401. The Postal Service may borrow money backed by the full faith and credit of the United States government. § 2006(c).

Congress also provided that the Postal Service may "sue and be sued in its official name." 39 U.S.C. 401(1). Federal courts have jurisdiction over suits brought by or against the Postal Service, and the Postal Service may remove suits against it to federal court. § 409(a). The same venue, service of process, time limitations, and rules of procedure that apply to litigation with the United States apply to suits involving the Postal Service. § 409(b). The Department of Justice provides legal representation to the Postal Service. § 409(d).

2. In 1991, petitioner, an employee of the Postal Service in Chicago, filed two administrative complaints alleging sexual harassment and unlawful retaliation by her co-workers and supervisors. See Pet. 5. The two complaints were heard by an Administrative Judge, who found that petitioner had been subjected to sexual harassment and retaliation. See Pet. App. C2. The Postal Service accepted the Administrative Judge's findings, and awarded petitioner injunctive relief, back pay, attorney's fees and costs, and $50,000 in compensatory damages for harm occurring on or after November 21, 1991, the effective date of the Civil Rights Act of 1991.[3] *Id.* at C2-C3.

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[3] Prior to 1991, Title VII did not provide for an award of compensatory damages for claims of sexual harassment. Congress authorized such awards in the 1991 Act. See 42 U.S.C. 1981a. In the administrative proceedings, the parties agreed that, under *Landgraf* v. *USI Film Products*, 511 U.S. 244 (1994), the compensatory damages provision is not retroactive, and that damages would be awarded only for discriminatory acts occurring on or after the effective date of the 1991 Act.

3. Petitioner accepted the injunctive relief and the award of attorney's fees, but rejected the compensatory damages award. She then filed this action in district court under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16, seeking $275,000 in compensatory damages and $25,000 in punitive damages. See *Baker* v. *Runyon*, 922 F. Supp. 1300, 1301 (N.D. Ill. 1996). The parties agreed that the case would be heard and decided by a United States Magistrate Judge. Because the Postal Service had adopted the recommended decision of the Administrative Judge and had agreed to award compensatory damages, it did not contest liability. See *Moore* v. *Devine*, 780 F.2d 1559, 1562-1563 (11th Cir. 1986).

The Postal Service moved to strike petitioner's request for punitive damages on the ground that it is exempt from punitive damages under 42 U.S.C. 1981a(b)(1), which provides: "A complaining party may recover punitive damages under this section against a respondent (other than a government, *government agency* or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or * * * practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual" (emphasis added). The district court rejected the Postal Service's argument that it is a "government agency" exempt from punitive damages under Section 1981a(b)(1). Pet. App. B1-B10. The court awarded petitioner $75,000 in compensatory damages and $50,000 in punitive damages. 922 F. Supp. at 1305.

3. The court of appeals reversed the award of punitive damages. The court noted that, as petitioner conceded that the Postal Service is a "government agency," she "faces an uphill battle" in arguing that

Congress did not intend to include the Postal Service within the statute's express exemption from punitive damages for government agencies. See Pet. App. A2-A3.

The court rejected petitioner's argument that the Postal Service may be subject to punitive damages because Congress intended it to operate "in a manner similar to a commercial entity." Pet. App. A4. "The Postal Service may be run in a manner *similar* to a private commercial entity, but it is not a private commercial entity," stressed the court, and "Congress could not have made its intention more clear that the Postal Service was to remain a part of the U.S. Government and to perform executive branch functions within the government." *Id.* at A4-A5. "[I]t would be illogical to assume that Congress, because it granted the Postal Service considerable autonomy, intended to grant the agency the status of a private actor. Congress knows how to create entities and confer upon them non-governmental status when it is Congress' intention to do so." *Id.* at A5-A6.

The court also rejected petitioner's contention that the waiver of sovereign immunity contained in the PRA's "sue-and-be-sued" clause shows that it is not a government agency. "If anything, [the presence of that clause] supports the position of the Postmaster General. The waiver of sovereign immunity is necessary solely because the Postal Service is a government agency." Pet. App. A6. Moreover, the court explained, the question whether Congress has waived sovereign immunity is "analytically distinct" from the question whether the substantive law provides for relief, and "[a]lthough Congress has waived the Postal Service's sovereign immunity, the substantive law relied upon by appellee in the instant case, Title VII, provides that punitive

damages are not available against government entities." *Id.* at A6-A7.

Finally, the court rejected petitioner's argument that exempting the Postal Service from punitive damages would be at odds with the purpose of Title VII. Although the court accepted that the 1991 amendments to the Civil Rights Act were intended as stricter measures to deter discrimination, the court found a clear legislative intent to exempt all federal agencies from punitive sanctions. Pet. App. A7-A9. Moreover, the court stated, awarding punitive damages against the Postal Service would not serve their intended deterrent purpose, since the cost would ultimately fall on the taxpayers, who are responsible for appropriations for the Postal Service. *Id.* at A8-A9.

ARGUMENT

The decision of the court of appeals, holding that the Postal Service is a "government agency" exempt from punitive damages in Title VII actions under 42 U.S.C. 1981a(b)(1), is correct. That decision also does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. a. The decision of the court of appeals is clearly correct. Although Congress did not define the term "government agency" in the Civil Rights Act of 1991 when it added Section 1981a, there can be little doubt that the Postal Service is a "government agency," as that term is commonly understood. The Postal Service was created to implement the power of Congress to "establish the Post Office and post Roads." U.S. Const. Art. I, § 8. The PRA provides that "[t]here is established, as an independent establishment of the executive branch *of the Government of the United States*, the United States Postal Service." 39 U.S.C. 201 (emphasis

added). It also states that the Postal Service "shall be operated as a basic and fundamental service provided to the people *by the Government of the United States*." § 101 (emphasis added).

The structure of the Postal Service also shows that it is a government agency. An 11-member Board of Governors directs "the exercise of the power of the Postal Service." 39 U.S.C. 202(a). The Board consists of nine Governors appointed by the President, with the advice and consent of the Senate; the nine Governors then appoint the Postmaster General and the Deputy Postmaster General, who make up the remaining two Board members. § 202(c)-(d). Congress expressly designated the Governors as "officer[s] of the Government of the United States in the Postal Service." § 205(d).

The status of Postal Service employees also supports the conclusion that the Postal Service is a government agency. Postal Service employees "shall be in the postal career service, which shall be part of the civil service." 39 U.S.C. 1001(b). Postal Service employees are eligible for promotion and transfer to any other position in the Executive Branch for which they are qualified. § 1006. Veterans-preference requirements that govern federal employment (see 5 U.S.C. 2108) apply to Postal Service employees. 39 U.S.C. 1005. The standards of suitability, security, and conduct that apply to all federal employees apply likewise to Postal Service employees. § 410(b)(1). Congress has also made the Postal Service subject to the Freedom of Information Act, the Government in the Sunshine Act, and the Privacy Act. *Ibid.* Federal criminal laws that pertain to federal employees also apply to Postal Service employees. § 410(b)(2).

Finally, the Postal Service exercises uniquely governmental powers in numerous respects. It has the

authority to borrow money backed by the full faith and credit of the United States government. 39 U.S.C. 2006(c). It has the power "to exercise, in the name of the United States, the right of eminent domain for the furtherance of its official purposes." § 401(9). And it shall "have the priority of the United States with respect to the payment of debts out of bankrupt, insolvent, and decedents' estates." *Ibid.* With the consent of the President, the Postal Service may negotiate international postal treaties or conventions. § 407. The Postal Service must submit an annual budget to the Office of Management and Budget. § 2009. And the Postal Service is represented by the Department of Justice in litigation. § 409(d).

It is apparent from these statutory provisions that the Postal Service falls within any common understanding of the term "government agency." Thus, while Congress reorganized the Postal Service to make its operations more "businesslike," H.R. Rep. No. 1104, 91st Cong., 2d Sess. 13 (1970), it also made clear that the Postal Service remains part of the federal government. By contrast, when Congress has intended to establish an entity outside the federal government, it has expressly provided that the entity in question shall not be considered an agency of the United States Government. *E.g.*, 15 U.S.C. 78ccc(a)(1) (Securities Investor Protection Corporation); 47 U.S.C. 396(b) (Corporation for Public Broadcasting); 47 U.S.C. 731 (COMSAT).

b. Nothing in the legislative history of the Civil Rights Act of 1991 suggests that Congress intended to exclude the Postal Service from the coverage of the term "government agency" without having expressly so provided. To the contrary, the few references to the federal government in the legislative history of the 1991 Act indicate that Congress intended the term to cover

the federal government generally. See 137 Cong. Rec. S15,460 (daily ed. Oct. 30, 1991) (statement of Sen. Kennedy) ("Clearly, it was our intent that the limitation on the award of punitive damages would apply to Federal, State and Local governments."); see also *id.* at H9526-9527 (daily ed. Nov. 7, 1991) (interpretive memorandum offered by Rep. Edwards) (the damages provision "reinforces the clear statutory intent that compensatory damages are available against federal, state and local governmental defendants to the same extent that they are available against private sector defendants; punitive damages are not"). The Conference Report for the 1990 bill that preceded the 1991 Act described the punitive damages section as follows: "The Conferees note that as used in Section 8, the term 'government, government agency, or political subdivision' includes the Federal government. Thus, punitive damages are not available against the Federal government." H.R. Conf. Rep. No. 856, 101st Cong., 2d Sess. 21 (1990); see 136 Cong. Rec. H9556 (daily ed. Oct. 12, 1990). Although President Bush vetoed the 1990 bill, he did not do so out of disagreement with the punitive damages provision, see S. Doc. No. 35, 101st Cong., 2d Sess. 1 (1990) (veto message), and Congress reenacted the same punitive-damages language in the 1991 Act. Thus, the legislative history supports a straightforward reading of the punitive-damages language as exempting all agencies of the federal government.

c. Petitioner also contends (Pet. 10) that the 1972 amendments to Title VII show that the Postal Service is not a government agency. Petitioner points out that Congress used the phrase "government, government agency or political subdivision" in a different section of the 1972 legislation to refer only to state and local governments. See 42 U.S.C. 2000e(a). According to peti-

tioner, the fact that Congress used that phrase to refer to state and local governments, while covering the Postal Service (along with all other federal agencies) in a separate section (42 U.S.C. 2000e-16), shows that the Postal Service is not a "government, government agency, or political subdivision" under the 1991 Act.

Petitioner's argument is without merit. The 1972 amendments to Title VII do not evince any intent by Congress to exclude the Postal Service from the definition of "government, government agency, or political subdivision." Rather, in those amendments, Congress chose to deal with the coverage of state and local governments under Title VII by amending the definition of "person" in Section 2000e(a) (which otherwise covers private employers), while addressing Title VII's application to the *entire* federal government—and not just the Postal Service—in Section 2000e-16. Petitioner's reasoning would lead to the conclusion that the entire federal government, and not just the Postal Service, was excluded from the exemption from punitive damages for any "government, government agency, or political subdivision"—a result plainly contrary to both the text of the statute and the legislative intent of Congress.[4]

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[4] In the court of appeals, petitioner argued that the Postal Service should not be considered a "government agency" because Section 2000e-16, which extends Title VII to the federal government, refers first to "executive agencies" as defined in 5 U.S.C. 105, and then expressly and separately includes the Postal Service within its coverage. Congress mentioned the Postal Service expressly in Section 2000e-16, however, because employees of the Postal Service are covered by some civil service employment rules that are different from those applicable to the federal government generally, and therefore the Postal Service is not included within the definition of "executive agency" in 5 U.S.C. 105. Indeed, if

d. Petitioner also errs in her contention (Pet. 11-14) that the court of appeals' decision conflicts with this Court's decisions interpreting the "sue and be sued" clause in the Postal Service's governing statute. A "sue and be sued" clause provides a waiver of sovereign immunity for judicial actions and "the natural and appropriate incidents of legal proceedings." *Loeffler* v. *Frank*, 486 U.S. 549, 554-555 (1988); *Franchise Tax Bd.* v. *United States Postal Service*, 467 U.S. 512, 517-518 (1984). The existence of a waiver of sovereign immunity, however, does not resolve whether the Postal Service is to be considered a "government agency" under substantive law, *i.e.*, Section 1981's punitive damages provision. The two inquiries are "analytically distinct." *United States* v. *Mitchell*, 463 U.S. 206, 218 (1983). As this Court recently explained in the context of another "sue and be sued" clause: "The first inquiry is whether there has been a waiver of sovereign immunity. If there has been such a waiver, as in this case, the second inquiry comes into play—that is, whether the source of substantive law upon which the claimant relies provides an avenue for relief." *FDIC* v. *Meyer*, 510 U.S. 471, 483-484 (1994).

The mere existence of a "sue and be sued" clause does not show that the entity in question is not a government agency. To the contrary, a "sue and be sued" clause is necessary to waive sovereign immunity precisely *because* the entity in question is a government

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Congress had intended to exclude the Postal Service from the exemption from punitive damages, it could have limited the exemption to "executive agencies," and borrowed that term from Section 2000e-16. Instead, Congress used the broader phrase "government agency," thus covering all of the governmental entities that are covered by Title VII under Section 2000e-16 (as well as state and local governments).

agency. See *Loeffler*, 486 U.S. at 553 (recognizing "sue and be sued" clause as necessary waiver of sovereign immunity). If the entity is not a government agency, then there is no sovereign immunity to waive. Indeed, the Veterans Administration, 38 U.S.C. 1820(a)(1), the Small Business Administration, 15 U.S.C. 634(b)(1), and the Department of Housing and Urban Development, 12 U.S.C. 1702, also have "sue and be sued" clauses, and yet it could hardly be disputed that those entities are government agencies.

e. Finally, petitioner errs in arguing (Pet. 14-15) that the "unique nature" of the Postal Service as a quasi-commercial entity means that it is not a government agency. Congress made clear, however, that its designation of the Postal Service as an "independent establishment" was designed not to divorce the Postal Service from the Executive Branch, but rather to provide the necessary independence from political pressures to make the Postal Service more efficient. See H.R. Rep. No. 1104, *supra*, at 13. As one court has noted, "Congress did not intend to create a private business, rather, it desired a more efficient government agency." *Friedlander* v. *United States Postal Service*, 658 F. Supp. 95, 101 (D.D.C. 1987); see *id.* at 99 (rejecting separation of powers challenge to structure of Postal Service, and holding that "the Postal Service is a governmental entity of the executive branch"). Accordingly, there is no basis for petitioner's argument that Congress intended to exclude the Postal Service, uniquely among federal agencies, from the reach of Section 1981a(b)(1).

2. The decision of the court of appeals does not conflict with the decision of any other court of appeals. The only other court of appeals that has considered the issue thus far has followed the court of appeals' decision

in this case. See *Robinson* v. *Runyon*, No. 96-1400, 1998 WL 406343 at *6-*7 (6th Cir. July 22, 1998) ("It is therefore clear that the Postal Service is a government agency for purposes of Title VII and we follow the Seventh Circuit in finding that as such the Postal Service is exempt from punitive damages."). The majority of district courts that have considered the issue have also agreed.[5]

In other contexts, there is widespread recognition among the lower courts that the Postal Service is a government agency. The courts of appeals have held that the Postal Service has the enforcement authority "of the executive branch of the United States government" and that its structure satisfies Appointments Clause requirements for Executive Branch agencies, *Silver* v. *United States Postal Service*, 951 F.2d 1033, 1035 (9th Cir. 1991); that the Governors' decisions to remove the Postmaster General are like "decisions to remove [other] government officials * * * who are not civil servants," in that they are not subject to judicial review, *Carlin* v. *McKean*, 823 F.2d 620, 623 (D.C. Cir. 1987), cert. denied, 484 U.S. 1046 (1988); that (absent express congressional authorization) civil suits against the Postal Service may not be tried to a jury because,

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[5] See, *e.g.*, *Jense* v. *Runyon*, 990 F. Supp. 1320, 1324 (D. Utah 1998); *Prudencio* v. *Runyon*, 76 Fair. Empl. Prac. Cas. (BNA) 1541 (W.D. Va. 1998); *Cleveland* v. *Runyon*, 972 F Supp. 1326 (D. Nev. 1997); *Griffin* v. *Runyon*, 1997 WL 359972 (N.D. Ill. 1997); *Tuers* v. *Runyon*, 950 F. Supp. 284 (E.D. Cal. 1996); *Ausfeldt* v. *Runyon*, 950 F. Supp. 478, 487-88 (N.D.N.Y. 1997); *Miller* v. *Runyon*, 932 F. Supp. 276, 277 (M.D. Ala. 1996); *Suhr* v. *Runyon*, 1995 WL 617478, *3 (N.D. Ill. 1995). To our knowledge, only one district court has held that the Postal Service is not a government agency under the 1991 Civil Rights Act. See *Roy* v. *Runyon*, 954 F. Supp. 368 (D. Me. 1997).

even though the Postal Service's sovereign immunity has been waived, "the party being sued is still the federal government," *Young* v. *United States Postal Service*, 869 F.2d 158, 159 (2d Cir. 1989); that the Postal Service may exercise the federal government's power of eminent domain, see *Benderson Development Co.* v. *United States Postal Service*, 998 F.2d 959, 962 (Fed. Cir. 1993); and that the Federal Rules of Appellate Procedure's 60-day time limit for filing a notice of appeal in cases involving the federal government applies to suits against the Postal Service, see *Maksymchuk* v. *Frank*, 987 F.2d 1072, 1075 (4th Cir. 1993). In short, "[n]o court has ever held the Postal Service not to be a part of the executive branch." *Silver*, 951 F.2d at 1036.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
FRANK W. HUNGER
Assistant Attorney General
MARLEIGH D. DOVER
MATTHEW M. COLLETTE
Attorneys

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